

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

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| <b>MARVIN PORTER</b>                   | ) |                      |
| Claimant                               | ) |                      |
|  | ) |                      |
| VS.                                    | ) |                      |
|  | ) |                      |
| <b>JACK COOPER TRANSPORT CO., INC.</b> | ) |                      |
| Respondent                             | ) | Docket No. 1,035,091 |
|  | ) |                      |
| AND                                    | ) |                      |
|  | ) |                      |
| <b>LIBERTY MUTUAL INSURANCE CO.</b>    | ) |                      |
| Insurance Carrier                      | ) |                      |

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the January 13, 2009, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on May 5, 2009. Michael H. Stang, of Mission, Kansas, appeared for claimant. Meredith L. Moser, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proving that he sustained an injury while in the course of his employment.

The Board has considered the record and adopted the stipulations listed in the Award. Although claimant's entitlement to unauthorized past and future medical expenses was raised as an issue in claimant's Application for Review of Award Before the Appeals Board, during oral argument before the Board, the parties agreed that if this claim is found compensable, then claimant is entitled to payment of his past medical treatment expenses, subject, of course, to the medical fee schedule, future medical upon application, and unauthorized medical up to the statutory maximum. Likewise, the parties agreed that claimant would be entitled to temporary total disability compensation for the period from April 30, 2007, through June 24, 2007, if the alleged injury is found compensable. There is no separate issue or dispute concerning whether claimant was temporarily and totally disabled during this time period. The parties further agreed that in the event this claim is

found compensable, the Board should decide the issues not reached by the ALJ rather than remanding it to the ALJ for a determination of those issues.

### **ISSUES**

Claimant argues that the evidence is clear that he was bitten by a spider in the cab of his truck on April 23, 2007, and that the wound caused by the bite created a portal which allowed Methicillin-resistant Staphylococcus Aureus (MRSA) bacteria to enter his body. Accordingly, claimant requests the Board reverse the ALJ's Award and award claimant the cost of his medical bills incurred, temporary total disability benefits, and permanent partial disability.

Respondent requests that the award of the ALJ be affirmed.

The issues for the Board's review are: Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent? If so, did claimant give respondent timely notice of accident? If so, what is the nature and extent of his disability?

### **FINDINGS OF FACT**

Claimant is employed by respondent as a truck driver. He testified that on April 23, 2007, he was on the road when he felt a prick sensation on his abdomen in an area three to four inches above his belt line. About 15 to 20 minutes later, he pulled over at a truck stop, pulled up his shirt, and looked at his abdomen. He saw a small, red pinhole wound, and he assumed he had been bitten by a spider in the cab. He testified that he had not noticed any marks or redness on his abdomen that morning before he left on his route.

Claimant admitted he did not actually see a spider in the cab of his truck that day. However, he testified that he had frequently seen spiders in the cab on the dash, steering wheel, his clothes, and his person. He said the last time he actually saw a spider in his cab was approximately a week before the April 23, 2007, incident. Claimant lives in a rural area, and his wife raises cattle and horses. He said he sprays for spiders, using a product his wife buys at the grocery store.

Claimant said he had no negative side effects from the bite that day, although the area grew a little more red. The next day, however, he noticed a mass in the area he had been bitten, and the redness was spreading. By that night, he was not feeling well. The next morning, April 25, he knew he had a problem, and he called his company and told Gary McCarty, respondent's payroll supervisor, that he had been bitten by a spider on Monday, April 23. Claimant said that Mr. McCarty told him he should probably see a doctor, and claimant asked if he could see his family doctor. He said that Mr. McCarty approved that, and he went to see Dr. Marla Brown, a chiropractor, on April 25. He said

that he and Mr. McCarty did not discuss whether his treatment would be covered by workers compensation.

Mr. McCarty testified that he remembered claimant calling and telling him he had pain in his abdomen and the area was red and looked like a spider bite. Claimant told him that he had been bitten while he was in the cab of his truck. Mr. McCarty said that claimant told him he had a pair of coveralls in the cab of his truck for a couple of months and thought that was where the spider possibly came from. Claimant did not suggest to Mr. McCarty that he had a workers compensation claim, and he did not suggest to claimant that it would be covered under workers compensation.

Claimant testified that Dr. Brown told him the bite area did not look good and that if he did not get better, he should see a medical doctor the next day. However, the next day, April 26, he felt better and the bite area looked no worse than before, so he returned to work. By Saturday, the affected area had gotten bigger and was beginning to drain. He was worse on Sunday, and on Monday morning, April 30, he went to the emergency room of Golden Valley Memorial Hospital, where he was admitted. While he was in the hospital, cultures were run, and he was told he had MRSA. He was in the hospital until May 9 receiving intravenous antibiotics. After his release from the hospital, he had two more intravenous treatments for MRSA before returning to work on June 25. He continues to work for respondent. Claimant has had no treatment for his condition since his return to work. He continues to complain of a sharp, burning pain in the area of the alleged bite. He said it bothers him to bend over, and he now wears his jeans lower than normal to keep his belt off the area.

Dr. Michael Poppa is board certified in occupational medicine and is a board certified independent medical examiner. He evaluated claimant on August 20, 2007, at the request of claimant's attorney. Claimant described for him an incident on April 23, 2007, when he was driving his transport and experienced an acute episode he described as a sting. He later noticed a "red angry looking area"<sup>1</sup> on the right lower quadrant of his abdomen. Claimant told Dr. Poppa that he assumed he was bitten by a spider, and based on his history and the medical records that indicated a spider bite, Dr. Poppa also assumed there was a spider bite. He agreed that claimant said he did not see a spider on April 23, 2007, and never found the spider in his truck. Dr. Poppa testified that as a result of claimant's injury to his skin from the spider bite, he developed MRSA, requiring hospitalization, surgery, and intravenous antibiotics.

Dr. Poppa examined claimant and found a well-healed but sensitive scar measuring 7 centimeters in the right lower quadrant of his abdomen. Claimant did not claim of pain on palpation of his scar, but he had some pain complaints in his scar area with forward flexion. The scar was indurated and discolored. Dr. Poppa opined that claimant's

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<sup>1</sup> Poppa Depo. at 10.

diagnosis was cellulitis, abscess formation overlying the right lower quadrant of his abdomen which resulted in MRSA. Dr. Poppa agreed that MRSA is a general community acquired infection that can occur to anyone at any time. He also agreed that spiders are not carriers of MRSA. Dr. Poppa, however, believed the initial inciting event for claimant's MRSA was a spider bite.

Using the *AMA Guides*,<sup>2</sup> Dr. Poppa opined that claimant had a Class II impairment for signs and symptoms of a skin disorder present or intermittently present, with limitation in the performance of some activities of daily living and where intermittent to constant treatment may be required. He rated this impairment as being 15 percent to the whole person.

Dr. Poppa admitted he does not specialize in infectious disease. He is not board certified in that specialty. He has, however, given opinions on infectious disease cases and from that standpoint, he would hold himself out as an expert. Dr. Poppa said that he has treated cases of infectious disease before and has dealt with MRSA in his practice. He has researched the topic. In this case, he went online to do research, using Google and a physician's site. He said that MRSA can happen to anyone. In this case, however, he opined there was a known inciting event that occurred in that claimant felt a sting or bite, shortly thereafter noticed redness, and a couple of days later developed systemic symptoms related to the infection.

Claimant was seen by Dr. Vito Carabetta on January 31, 2008, at the request of the ALJ. Dr. Carabetta examined claimant and found that his complaints were intermittent and variable. He noted that the physical examination showed claimant to be "rather hypersensitive in the area of the scar itself."<sup>3</sup> Using the *AMA Guides*, Dr. Carabetta rated claimant as having a 3 to 4 percent permanent partial impairment to the whole body. As the *AMA Guides* do not specifically list claimant's problem, he used the chapter dealing with hernias of the abdominal wall. Dr. Carabetta did not provide an opinion concerning causation of claimant's MRSA condition.

Claimant was also seen by Dr. David McKinsey, who is board certified in internal medicine with a subspecialty in infectious disease. He has given lectures about spider bites and about MRSA. He has written at least one paper in which he discussed MRSA and has briefly discussed MRSA in a couple chapters he wrote in papers concerning pneumonia.

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>3</sup> IME report of Dr. Vito Carabetta filed Feb. 4, 2008, at 3.

Dr. McKinsey examined claimant on May 14, 2008, at the request of respondent. He reviewed claimant's medical records, including the records of his hospitalization. He said claimant's hospital records were thorough and described his clinical presentation, physical findings, operative findings, laboratory results, and neurology results, which helped clarify the cause of his illness. Dr. McKinsey likewise reviewed the records of the chiropractor who claimant saw on April 25, 2007, a couple days after the alleged spider bite. The chiropractor's records indicate that claimant had two to three inches of redness around the bite and hardness with palpation, which Dr. McKinsey said would be unusual for a spider bite. He said that typically with a spider bite, there is a bluish discoloration that is more localized, maybe up to an inch or a little more, and there is not such extensive redness only two days after a spider bite. He said symptoms from a spider bite would progress more slowly; redness would be more extensive over a period of a week or ten days, but not immediately after the bite.

Claimant told Dr. McKinsey that while he was driving his truck, he felt a sensation on this abdomen which he described as a prick sensation. About 22 hours later, he developed flu-like symptoms which included nausea, diffuse muscle pain, and intermittent chills. Hours later, he developed pain in the same area where he had felt the prick sensation earlier. About 24 hours later, he became extremely weak with worsening abdominal pain and developed focal swelling in his abdomen, which came to a boil. He was able to express thick fluid that looked like mashed strawberries from the area.

Upon examination, Dr. McKinsey stated that claimant had a six centimeter scar on the right lower quadrant of his abdomen. Dr. McKinsey's report stated: "There was severe tenderness to superficial palpation around the healed right lower quadrant scar, far out of proportion to any objective physical findings."<sup>4</sup> He found no objective evidence of inflammation on examination to explain claimant's pain and tenderness and concluded that the symptoms were secondary to anxiety and not attributable to his previous infection and surgical procedures.

Dr. McKinsey said that claimant definitely had MRSA on his abdomen. MRSA is a bacteria and is one of the most common causes of skin and soft tissue infections. There are two major forms of MRSA. One is the hospital strain, and the other is community acquired MRSA, which is the form claimant had.

Dr. McKinsey said that in order to get MRSA, there must be exposure to the bacteria and there must be a portal of injury of the infection. If a person touches another person who is carrying MRSA and gets it on his skin and then has a puncture injury, the bacteria could be pushed under the skin and develop an infection. In many cases, the specific portal of injury cannot be identified and could have been a very minor trauma not recognized by the individual. Even if claimant had a spider bite, he would have needed

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<sup>4</sup> McKinsey Depo., Ex. 2 at 2.

exposure to the bacteria. Dr. McKinsey stated: "I don't think there's any question that [claimant] acquired the bacteria from another person. Who and where and when that happened, we can't determine."<sup>5</sup> He attributed the need for claimant's medical treatment to the bacteria, not the spider bite.

Dr. McKinsey said that the records of the pathologist at Golden Valley Memorial Hospital described findings classic for soft tissue infection with abscess. The pathologist added a comment that those findings were consistent with the clinical impression of an infected insect bite. Dr. McKinsey opined, however, that the pathologist did not have much basis for making that statement. He said that insect bites rarely, if ever, become infected. Therefore, he disagreed with the opinion of the pathologist. He said that regardless of whether claimant had a spider bite, it is unknown where the bacteria came from. But it did not come from the spider. He said that in his opinion, "histopathologic findings do not confirm the initial source of infection, which cannot be elucidated in this case."<sup>6</sup>

Dr. McKinsey stated that the MRSA bacteria would affect the same area that served as the portal of injury. He stated:

The scenario that is thought to occur most commonly, and almost routinely, is that people acquire MRSA—they get it on their hands somehow and touch their nose, and the nostrils and the outer part of the nose are particularly notorious breeding ground for MRSA, even though a person barely has symptoms in that location.

So you get it on your hand, you touch your nose. The nose remains colonized and then weeks or months later, you touch your nose and touch another part of the body and it spreads to the other part of the body.<sup>7</sup>

Dr. McKinsey said that doctors have been told to assume MRSA when people go into the hospital and say they have had a spider bite. Dr. McKinsey said that a lot of people think they have been bitten by a spider because they have an acute onset of localized pain and have some skin necrosis or ulcer in the skin. He said it was theoretically possible that a spider created the insult to claimant's skin that created the portal for the MRSA. However, he said that based on statistics, the vast majority of reported spider bites wind up being some manner of MRSA. Based on claimant's history and the fact that there was no dead spider, it is Dr. McKinsey's belief that he was not bitten by a spider in his truck. He has not personally seen or talked to anyone else who has observed a spider bite

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<sup>5</sup> McKinsey Depo. at 13.

<sup>6</sup> McKinsey Depo., Ex. 2 at 3.

<sup>7</sup> McKinsey Depo. at 23.

that later became infected with MRSA. Dr. McKinsey testified: "I suspect that that sensation [claimant] experienced was the infection itself."<sup>8</sup>

Dr. McKinsey said his opinion that claimant was not bitten by a spider was based on statistical information regarding purported spider bites and the fact that claimant said he had not observed any spiders in his truck, on his clothing or on his skin at the time the incident occurred. Therefore, he did not think it was reasonable to think this was a spider bite.

MRSA occurs after something happens to the skin. Dr. McKinsey said that most of the time, the portal of injury where the traumatic event occurs is so minor as to be unrecognizable. It could be that someone had a few bacteria on the skin, scratched himself, and that was enough to introduce bacteria below the skin surface.

Q. [by Claimant's Attorney] Well, again you testified earlier that often times the insult to the skin is so insignificant as to be unnoticed; correct?

A. [by Dr. McKinsey] Correct.

Q. But, again, that does mean that insult to the skin happens and then MRSA enters?

A. True.

Q. So whether it's a fingernail scratching too deep or brushing against the side of a desk or insect bite, there is some insult to the skin that allows MRSA to enter; correct?

A. Correct.

Q. So if he had showed up with a spider and said hey, this guy bit me and they look at it and say this isn't a venomous spider, but yet he still could develop MRSA after a spider bite like that; correct?

A. It's possible.<sup>9</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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<sup>8</sup> *Id.* at 28.

<sup>9</sup> *Id.* at 30.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>10</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>11</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>12</sup>

### ANALYSIS

The compensability of this claim hinges upon claimant proving that it is more probably true than not true that his MRSA condition entered his system through a spider bite that occurred while claimant was working. The situs of the infection is the abdominal area where claimant felt a sensation while driving his truck on April 23, 2007. It has not been established, however, that what claimant experienced was a bite. No spider was observed. Moreover, the Board is persuaded by the expert opinion testimony of Dr. McKinsey that what claimant believed to be a spider bite on April 23, 2007, was more likely a symptom of the MRSA infection already in his system. Dr. McKinsey also said that what was described in the records of Dr. Brown and the hospital would be unusual for a spider bite. The physical description of the area was inconsistent with both the appearance and the progression of spider bite symptoms. Instead, it was consistent with the spread of the MRSA bacterial infection. The injury that served as the portal for the MRSA infection is unknown, but it was probably not a spider bite.

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<sup>10</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>11</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>12</sup> *Id.* at 278.



**CONCLUSION**

Claimant has failed to prove he suffered personal injury by an accident which arose out of and in the course of his employment with respondent.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated January 13, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant  
Meredith L. Moser, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge